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In the Supreme Court of the United States

OCTOBER TERM, 1976

ILLINOIS BRICK COMPANY, ET AL., PETITIONERS

v.

STATE OF ILLINOIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the purchasers of a price-fixed product may recover under the antitrust laws for loss caused by overcharges paid by the original purchasers and passed on to them as subsequent purchasers.

INTEREST OF THE UNITED STATES

Private actions for damages pursuant to Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15, have served an important role, supplemental to that of public actions, in enforcing the antitrust laws. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262. The United States therefore has an interest in preserving the effectiveness of private actions. Moreover, Section 4A of the Clayton Act, as added, 69 Stat. 282, 15 U.S.C. 15a, gives the United States a right to recover the actual damages it suffers as a result of violations of the antitrust laws. The United States purchases substantial quantities of goods from distributors, wholesalers and

contractors that have in turn purchased goods (or parts of goods) from others. In these cases the United States stands in the same relation to any price fixer which sold to its supplier as respondents do to petitioners, and the adoption of petitioners' arguments therefore would restrict the right of the United States to recover for loss caused by overcharges passed on to it by intervening parties. Cf. *Hawaii*, *supra*, 405 U.S. at 264–265.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In the present case petitioners manufactured concrete block and sold it to respondents through one or more intermediaries, usually construction contractors and their masonry subcontractors. For the purpose of this case we must assume, as the complaint alleged

[1] For example, the United States, which purchases drugs for use in federal hospitals and pays through Medicare and Medicaid for drugs purchased by others, is one of the plaintiffs in the antibiotic antitrust cases. It has refused a settlement offer of $14.3 million (Wolfram, *The Antibiotics Class Actions*, 1976 A.B.F. Res. J. 251, 316–317 and n. 23); the case has been through one trial (see *United States* v. *Lord*, 542 F. 2d 719 (C.A. 8)) and is awaiting another. The United States also is seeking damages as an indirect purchaser of reinforcing rods used in buildings (*United States* v. *Armco Steel Corp.*, S. D. Tex., Civ. No. 73–H–1427) and folding carton containers (*United States* v. *Alton Box Board Co.*, N. D. Ill., Civ. No. 76C–1638). If the arguments of petitioners are accepted, the prospects of recovery by the United States in these and similar cases may be substantially undermined.

(A. 10–11), that petitioners unlawfully fixed the price of this concrete block.[2]

If contractors or their subcontractors (the "direct-purchasers") sue the manufacturers, they may allege and prove several types of damages. They may seek to prove lost profits, including profits that would have been earned but for sales lost because of the need to charge higher prices to customers. Alternatively, they may attempt to recover the amount of the illegal overcharges paid. If they choose the latter theory the defendants may offer to prove that the direct purchasers suffered no injury, because they passed on the illegal overcharges to their customers. Such an offer of proof would be a "defensive" use of the passing-on theory.

Ultimate consumers or other indirect purchasers of the overpriced goods also may sue the price-fixers, alleging that the price of the goods they purchased had been increased because of the illegal overcharges to the direct purchasers. In order to prove injury, the consumers or other indirect purchasers would offer to demonstrate that all or part of the illegal overcharge was passed on by the direct purchasers. This situation, which is present in the instant case, is an "offensive" use of the passing-on theory.

Before 1968, when this Court decided *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481,

[2] In 1973 an indictment returned in the United States District Court for the Northern District of Illinois (*United States* v. *Ampress Brick Co., et al.*, No. 73 CR 312) charged petitioners with conspiring to restrain trade in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, by fixing the price of concrete block. Petitioners pleaded *nolo contendere* to that indictment.

there were two lines of authority in the lower courts dealing with passing-on problems. In defensive use cases the courts had generally rejected the defendants' offer to prove that intermediaries in the chain of distribution were uninjured because they passed on the overcharges.[3] These courts concluded that the purposes of the antitrust laws to compensate the victims of price-fixing, and to use private enforcement to deter other violations of the law, would be frustrated if defensive use of a passing-on claim were allowed. *Hanover Shoe* came to the same conclusion, relying on the same reasons.

In offensive use cases, however, the lower courts held that indirect purchasers would be allowed to prove—if they could—that they had been injured by illegal overcharges passed on to them by others in the chain of distribution.[4] These decisions rested on the same grounds as the decisions rejecting defensive use of the passing-on claim: the principle that victims of antitrust violations should recover for their losses, and the policy of promoting private enforcement of the antitrust laws.

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[3] See Annotation, 1 A.L.R. Fed. 500 (1969); see also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491–492 n. 8.

[4] See *Armco Steel Corp.* v. *North Dakota*, 376 F. 2d 206 (C.A. 8); *Washington* v. *American Pipe & Construction Co.*, 274 F. Supp. 961 (W.D. Wash.); *Washington* v. *General Electric Co.*, 246 F. Supp. 960 (W.D. Wash.); *Missouri* v. *Stupp Bros. Bridge & Iron Co.*, 248 F. Supp. 169 (W.D. Mo.). Cf. *Dailey* v. *Quality School Plan, Inc.*, 380 F. 2d 484, 487–488 (C.A. 5) (Bell, J.); *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F. 2d 414, 417–418 (C.A. 4), certiorari denied, 385 U.S. 934.

We submit that allowing indirect purchasers to try to prove that they have been injured by overcharges passed on to them is no less appropriate now than it was before *Hanover Shoe*. The language of Section 4 of the Clayton Act is direct: "[a]ny person" injured in his "business or property by reason of anything forbidden in the antitrust laws" is entitled to recover treble damages. The Court has emphasized that this provision should be construed sufficiently broadly to permit achievement of the goals of compensating the victims of unlawful conduct and deterring other violations of the antitrust laws.

A suit by indirect purchasers of price-fixed goods may be an important instrument in fulfilling these goals. In many circumstances the indirect purchasers bear the brunt of the injury caused by violations of the antitrust laws; unless they may maintain a suit for damages, these injuries will go unredressed. In many cases the direct purchasers may elect not to sue, or not all will sue; when this happens the deterrence Congress sought to bring about through treble damages actions will not be achieved unless indirect purchasers are allowed to prove and collect their own damages.

Nothing in *Hanover Shoe* calls for a different result. In that case the Court rejected defensive use of passing-on claims because defensive use would defeat the purpose of the antitrust laws to deter violations. In *Hanover Shoe* no indirect purchasers had sought recovery, and the only persons with a stake in the matter sufficient to justify seeking judicial relief were direct purchasers. To allow a passing-on defense in that case

would have been to allow the violator of the antitrust laws to retain the spoils of his misdeeds.

It is true that the *Hanover Shoe* Court remarked upon the practical difficulties in proving the extent of passing-on. But it is one thing to say that these difficulties should not be allowed to defeat recovery by a person who clearly paid illegal overcharges (as in *Hanover Shoe*) and quite another to say (as petitioners do) that because a plaintiff in an antitrust case will have a hard time proving his case, he should not even be allowed to try. It would be a looking-glass world if, as a result of *Hanover Shoe*, only the direct purchaser, which might well be uninjured, could recover, while the indirect purchaser who bore the ultimate loss were told that his claim that he had suffered loss is too difficult to merit judicial attention, without even an inquiry into whether it might be proved in a reasonably precise and efficient manner.

Petitioners' suggestion that *Hanover Shoe* establishes a rule that only those in privity with the price-fixers may recover damages for violations of the antitrust laws fares no better. Section 4 establishes a test of causation (any person injured "by reason of anything forbidden" may recover) and not, as petitioners contend, a test of contractual relationships. A violation of the antitrust laws may be thought of as a statutory intentional tort. Privity with the tortfeasor is not a precondition at common law to recovery for loss caused by intentional torts; indeed, the requirement of privity has been abandoned in recent decades even for negligent torts.

Petitioners also contend that allowing suit by indi-

rect purchasers will lead to double recovery. This alarmist position is not supported by the record in this case; petitioners have not established that, if respondents recover fully for their provable loss, petitioners will be required to pay more than the total loss their illegal conduct caused. Moreover, there are a number of devices by which double recovery can be averted in other cases.

Transfers and consolidation can bring the several classes of victims together in a single action, in which damages can be apportioned. Defendants concerned about multiple recovery may invoke statutory interpleader under 28 U.S.C. 1335, leaving those who claim to be victims of the unlawful conduct to contest among themselves the proper distribution of damages. Petitioners argue for a broad rule—a rule that prevents indirect purchasers from recovering whether or not the defendants are exposed to double recovery. The possibility that some defendants may be exposed to double recovery is not, however, a reason why all defendants should be immune from recovery by all indirect purchasers.

The rule for which petitioners contend would broadly cut off recovery by large groups of victims of unlawful practices, perhaps even by those who bore the brunt of the injury. The benefits of petitioners' rule—prevention of difficult problems of proof in establishing damages, and prevention of double recovery in speculative cases not presented here—do not justify allowing violators of the antitrust laws to retain the benefits of their illegal acts and insulating potential violators from what may be a powerful deterrent to misconduct.

ARGUMENT

A PERSON WHO PURCHASES GOODS THROUGH AN INTERMEDIARY MAY RECOVER DAMAGES FOR AN INCREASE IN THE PRICE OF THE GOODS CAUSED BY ILLEGAL PRICE FIXING

A. THE LANGUAGE AND POLICY OF SECTION 4 OF THE CLAYTON ACT SUPPORT DAMAGES AWARDS TO INDIRECT PURCHASERS WHO CAN PROVE LOSS

Petitioners ignore the language of Section 4 of the Clayton Act, upon which this case turns. They instead make broad arguments concerning problems of judicial administration (Pet. Br. 10–17, 19–23) and the possibility of multiple recoveries (*id.* at 17–19). It is possible that these arguments, if presented to Congress, would persuade the legislature to narrow the class of permissible plaintiffs in antitrust cases.[5] But we must take the statute and the legislative policy as we find it. Section 4, and the policies it implements, demonstrate that indirect purchasers of goods may attempt to establish that the price they paid was inflated because of illegal overcharges in violation of the antitrust laws. If they can establish this, bearing the burden of proof, they are entitled to recover treble damages for their loss.

Section 4 of the Clayton Act provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"

[5] We doubt that Congress would be impressed by such arguments. It explicitly rejected similar arguments in enacting the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1383. See S. Rep. No. 94–803, 94th Cong., 2d Sess. 44 (1976).

may recover treble damages for his loss. The respondents are "persons" for purposes of this Section,[6] and any loss they may have suffered is loss in their "business or property."[7] Respondents thus need to establish only that they suffered loss "by reason of anything forbidden in the antitrust laws."

Whether indirect purchasers suffer injury "by reason of" overcharges to the direct purchasers, within the meaning of Section 4, depends upon an evaluation of the purposes of the treble damages recovery. The Court has indicated that Section 4 was designed to serve two vital functions: the provision of compensation to the victims of violations of the antitrust laws, and the encouragement of private suits that will deter future violations. See, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265–266 (" '[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion

[6] See *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439; *Georgia* v. *Evans*, 316 U.S. 159.

[7] States and their subdivisions satisfy the "business or property" requirement when they seek recovery for damages inflicted on them in their proprietary capacities. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n. 14, 264; *Hanover Shoe, supra*, 392 U.S. at 490. A State is in the business of providing governmental services, and overcharges that increase the price of providing these services to its residents inflict injury both in "property" (because of the increase in expense) and "business" (because of the capacity in which the State was acting). See *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390. On the other hand, a general injury to the State's economy would not be an injury to the State's "business or property." *Hawaii, supra*, 405 U.S. at 260–266.

of the plaintiff's rights"); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130–131; *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134; *Hanover Shoe, supra*, 392 U.S. at 494. Indeed, the Court has held that effectuating the deterrent policy of the antitrust laws is so important that damages should be awarded even when the plaintiff is "no less morally reprehensible than the defendant" with whom he conspired. *Perma Life Mufflers, supra*, 392 U.S. at 139.

Because of the importance of these goals, the Court has frequently indicated that Section 4 should be liberally construed to allow recovery. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236, observed that "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. * * * The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Radovich* v. *National Football League*, 352 U.S. 445, 454, pointed out that courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws." In *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660, the Court once more indicated a willingness to interpret Section 4 broadly, writing that "to state a claim upon which relief can be granted * * *, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires." [8]

This does not mean that the category of persons entitled to recover damages is limitless. The statute itself contains limits; it requires injury to "business or property," and the damage suffered by the plaintiff must come about "by reason of" a violation of the antitrust laws. The latter provision creates a requirement akin to that of "proximate cause" in the law of torts.

The defendant may not be required to answer in damages for injuries too remote from his violation of the antitrust laws. See *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251. The need to confine within reasonable bounds the class of those permitted to recover has led the courts of appeals to develop the "target area" test, which requires plaintiffs to demonstrate a sufficient relationship to the area of the economy sought to be secured against the effects of antitrust violations.[9]

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[8] See also *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, a price discrimination case. The Court rejected any requirement of privity between the plaintiff and the alleged violator of the antitrust laws, concluding that a plaintiff seeking to recover damages need show only a "causal connection between the price discrimination in violation of the Act and the injury suffered. * * * If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury." 395 U.S. at 648.

[9] See, *e.g.*, *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358 (C.A. 9); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F. 2d 1292 (C.A. 2), certiorari denied, 406 U.S. 930; *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F. 2d 122, 129 (C.A. 9), certiorari denied *sub nom. Morgan* v. *Automobile Manufacturers Ass'n, Inc.*, 414 U.S. 1045. At least two courts have suggested that this test could be reformulated in a way still more favorable to

Under the "target area" test indirect purchasers could recover, because they can prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes [petitioners'] acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, No. 75–904, decided January 25, 1977, slip op. 11.[10]

If respondents were in fact injured by overcharges passed on to them, the principle favoring recovery by the victims supports allowing them to demonstrate their loss. It is widely accepted that at least part of an overcharge may be passed on, and it is not implausi-

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plaintiffs. See *Malamud* v. *Sinclair Oil Corp.*, 521 F. 2d 1142 (C.A. 6) (adopting the test of *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150); *Cromar Co.* v. *Nuclear Materials & Equipment Corp.*, 543 F. 2d 501 (C.A. 3) (adopting a balancing test taking into account the nature of the industry, the relationship of the plaintiff to the alleged violator, and the alleged effect of the violation on the plaintiff).

[10] Numerous commentators have concluded that the "target area" approach, which the Court apparently adopted in *Brunswick*, supports the right of indirect purchasers to recover damages. See, *e.g.*, Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-on*, 123 U. Pa. L. Rev. 976 (1975); Comment, *Mangano and Ultimate-Consumer Standing: The Misuse of the Hanover Doctrine*, 72 Colum. L. Rev. 394 (1972); Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-On Doctrine*, 46 S. Cal. L. Rev. 98 (1972). But cf. Handler and Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach*, 85 Yale L. J. 626, 638–655 (1976) (apparently agreeing that indirect purchasers can recover damages under a proximate cause test, but arguing that problems of proof should lead courts to preclude such recovery).

ble to believe that respondents were injured.[11] Moreover, in many cases, of which this may be one, the goal of deterrence cannot be achieved unless indirect purchasers are allowed to recover.

Indirect purchasers may have suffered the largest injuries and have the largest stake in recovery. Direct purchasers may be reluctant to file a suit that would jeopardize harmonious relations with a supplier; indirect purchasers, on the other hand, are unlikely to have business relationships with the antitrust violators and accordingly may be more likely to perform the role of private attorneys general that Congress envisioned. Indirect purchasers therefore perform a vital public function when they bring suits to recover for their private losses.

[11] When the cost of production of a good (here, buildings using concrete block) increases, sellers will demand more money for their product. Whether they recoup the full cost increase or whether, instead, they reduce their volume of sales and recoup part of the increase, depends upon the elasticity of the demand for their product. In almost all cases at least some pass-on is to be expected, and the Court has assumed this in analogous cases. For example, the Court has articulated in tax immunity cases a presumptive rule that a tax imposed on a seller is passed on to the buyer. *Gurley* v. *Rhoden*, 421 U.S. 200, 204–205. The "legal incidence" of a tax also ordinarily rests with the vendee of the person upon whom the tax is levied. *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463; *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268. Cf. *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339, 346–348. Although *Hanover Shoe* makes it clear that the courts should not indulge a similar passing-on presumption in antitrust cases, the tax cases demonstrate that passing-on may be a prevalent phenomenon that shifts the incidence of a tax or an illegal overcharge to the ultimate consumer or indirect purchaser.

In our view, under any version of a proximate cause test that takes account of the purposes of the treble damages provision of Section 4, respondents should be entitled to attempt to prove that they were damaged as a result of petitioners' acts. This follows directly from the language of Section 4, from its purposes, and from this Court's indications that it should be construed to carry out those purposes. This conclusion also is supported by this Court's decision in *Hawaii* v. *Standard Oil Co.*, *supra*, and by the recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1383, 1394–1395.

In *Hawaii* this Court indicated that States and their subdivisions may recover for losses, caused by antitrust violations, they suffer in their role as consumers of goods and services (405 U.S. at 263 n. 14, 264). States usually consume or use goods and services in the manner of respondents in this case: they purchase them through intermediaries, such as wholesalers or contractors. *Hawaii* therefore endorses, at least implicitly, recovery by indirect purchasers.

So, too, does Congress. The Antitrust Improvements Act allows States to sue as *parens patriae* for damages inflicted by antitrust violations upon consumers within the State. Because consumers rarely purchase goods directly from the antitrust violators (unless there is a conspiracy among retailers), the promise of the Antitrust Improvements Act would be illusory unless Section 4 of the Clayton Act authorizes recovery for the losses inflicted upon indirect purchasers. The legislative history of the *parens patriae* provisions contains no evidence that Congress thought that it was

authorizing the States to sue in a *parens patriae* capacity only where consumers were direct purchasers. To the contrary, Congress assumed that indirect purchasers may recover.[12] In light of this congressional decision to expand the recovery of damages for losses inflicted upon consumers, the Court should construe Section 4 of the Clayton Act in a way that advances rather than defeats the evident purpose of this recent legislation.

Petitioners nevertheless argue that indirect purchasers may not recover damages, whether or not they could succeed in demonstrating that they had been injured "by reason of" petitioners' activities. Petitioners seek support for their position in *Hanover Shoe* and in the need to prevent multiple recoveries for the same violation of the antitrust laws. We turn to an analysis of petitioners' arguments.

B. THIS COURT'S DECISION IN *HANOVER SHOE* DOES NOT PREVENT INDIRECT PURCHASERS FROM ATTEMPTING TO PROVE THAT THEY HAVE BEEN DAMAGED

Hanover Shoe involved a suit by a direct purchaser of machinery used to manufacture shoes. The plaintiff

[12] The Ninth Circuit had held, in a widely-discussed opinion, that indirect purchasers may recover for proven losses caused by antitrust violations. *In re Western Liquid Asphalt Cases*, 487 F. 2d 191, certiorari denied *sub nom. Standard Oil Co.* v. *Alaska*, 415 U.S. 919. Congress evidently was familiar with this case; the major committee reports assumed that it correctly stated the law. See H.R. Rep. No. 94–499, 94th Cong., 1st Sess. 6 n. 4 (1975); S. Rep. No. 94–803, 94th Cong., 2d Sess. 44 (1976). One of the major sponsors of the Act stated that consumers could recover damages whether or not they purchased directly from the price-fixer. See 122 Cong. Rec. H10295 (daily ed., September 16, 1976) (remarks of Rep. Rodino).

claimed that the shoe machinery manufacturer had violated the antitrust laws. The manufacturer responded that the plaintiff had not been injured because it had passed on, to the buyers of its shoes, any illegal overcharges in the price of shoe machinery. The Court held that this defensive use of a passing-on claim could not be allowed to defeat the plaintiff's right to recovery.

The Court advanced several reasons for this holding. It observed that the indirect purchasers (the buyers of shoes) had suffered only a little loss on each purchase and that, because of this, none had brought suit; unless the plaintiff were allowed to recover, the violation of the antitrust laws would go without redress (392 U.S. at 494). Effective deterrence therefore would be undercut by defensive use of a passing-on claim.

The Court also concluded that the direct purchaser had suffered harm within the meaning of the antitrust laws because the violation was complete at the time the defendant extracted the overcharges for the shoe machines; "[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows" (392 U.S. at 489). The goal of compensating the victims of antitrust violations therefore was inconsistent with the defensive use of a claim that the immediate buyer had, in turn, imposed the burden on its customers.[13] Finally, the Court concluded that pass-

[13] The fact that a direct purchaser may recover, from its own customers, the overcharge it paid does not necessarily mean that it suffered no damage. The increased price charged to customers by the direct purchaser may induce its customers to look to other sellers or to use substitute goods. The direct purchaser therefore may suffer a decrease in the volume of its sales, with a corresponding decrease in its profits.

ing-on is difficult to prove (392 U.S. at 491–493), and that problems of proof should not be allowed to consume judicial time and obstruct recovery by plaintiffs who have paid illegal overcharges.

1. Petitioners seize upon the last of these rationales. They argue that, if passing-on is difficult or impossible for defendants to prove in order to defeat recovery, it is just as difficult for plaintiffs to prove in order to obtain recovery. Therefore, they maintain, neither plaintiffs nor defendants should be allowed to contend that an overcharge was passed on to third parties.

Petitioners' argument goes far afield from anything in Section 4 of the Clayton Act. The argument that passing-on is difficult to prove does not establish that respondents were not injured in their business or property "by reason of anything forbidden" by the antitrust laws. It is, rather, an argument that respondents should be forbidden to prove that they were, in fact, injured "by reason of" petitioners' deeds.

Petitioners' argument mistakes the nature of the reasons advanced in *Hanover Shoe*. It exalts one reason (difficulty of proof) over two more important considerations (compensation of the victims and effective deterrence of antitrust violations). More important, it turns *Hanover Shoe* on its head by converting the argument that difficulties of proof should not be allowed to stymie recovery, as in *Hanover Shoe*, into the argument that difficulties of proof must stymie recovery, as in the instant case.

It is one thing to say that, in view of the important policy considerations favoring recovery, recovery will not be barred because the defendant may not be able

to prove in a particular case that the plaintiff suffered no damage. It is quite another to conclude that the difficulties plaintiffs as a class may face in proving damages justify denying recovery even to particular plaintiffs who can offer such proof.

Passing-on doubtless can be difficult to prove. Respondents may be put to a considerable task in establishing that they were injured "by reason of" overcharges paid by the direct purchasers. See *Hanover Shoe*, *supra*, 392 U.S. at 491–493. But respondents bear that burden; if they fail in their proof they will not recover. If it appears certain before trial that respondents' proof must fail, petitioners may be entitled to summary judgment.

Perhaps the difficulties of proof are such that many indirect purchasers would fail to establish damage. But petitioners' argument goes beyond this; petitioners seek the right to prevail without allowing the indirect purchasers the opportunity to submit proof. They seek to turn the fact that damages may be difficult to prove into a rule that proof may not be offered.

This approach is fundamentally incompatible with the rule that recovery is not defeated merely because proof may be difficult. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123–125, 130–131, 133. Questions concerning the sufficiency of the plaintiff's proof are ordinarily for the jury to determine, and judicial speculation that many plaintiffs will be unable to prove their claims is not a good reason to preclude every plaintiff from trying. Cf. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 472–473; *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655.

In some cases the effect of an overcharge to the direct purchaser will be exceedingly difficult to discern. *Hanover Shoe* was one such case. The plaintiff bought shoe machinery but did not resell it; instead, the plaintiff used the machinery in the process of manufacturing shoes, then sold the shoes. It would have been hard to separate the effect of the price of shoe machinery from the price of shoe leather, employees' salaries, and all the other components of a finished shoe. The Court indicated, however, that other cases might be different and might permit even the defensive use of a passing-on claim; it gave as an example the case in which the overcharged buyer resold the goods pursuant to a preexisting "cost-plus" contract (392 U.S. at 494).

It follows that *Hanover Shoe* does not prohibit the offensive use of passing-on claims. For the reasons we have discussed at pages 8–15, *supra*, offensive passing-on claims should not be disfavored, as are defensive passing-on claims. An indirect purchaser should be entitled to demonstrate before trial how the overcharge may have been passed on; if he can do so, the resolution of the question whether the overcharge was passed on in fact should be left to the trier of the facts.

In the instant case respondents might be able to prove that the masonry subcontractors took the price of concrete block as a fixed item in computing their own prices, adding costs for labor and profit when submitting bids to do work calling for concrete block. The amount of such block to be used ordinarily is specified by the architect, so that it would not be hard to determine to what extent any overcharges led to the substitution of one product for another. If respondents could

introduce evidence of this sort concerning the practices of subcontractors, and other relevant information about the construction industry, they should be able to establish passing-on sufficient to allow the case to go to a jury.

Using this or similar reasoning, every court of appeals (but one) to consider the question after *Hanover Shoe* has concluded that neither this Court's decision nor any policy of the antitrust laws prevents indirect purchasers from attempting to prove that they have been injured.[14] The only exception—*Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F. 2d 1187 (C.A. 3)—is a one-page *per curiam* opinion that does not consider any of the arguments made here. It has been explicitly rejected by subsequent appellate

[14] See, in addition to the decision below, *Yoder Bros., Inc.* v. *California-Florida Plant Corp.*, 537 F. 2d 1347, 1374–1375 and n. 27 (C.A. 5); *In re Western Liquid Asphalt Cases, supra*; *Illinois* v. *Bristol-Myers Co.*, 470 F. 2d 1276, 1278 n. 4 (C.A.D.C.) (by implication); *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 440 F. 2d 1079 (C.A. 2), certiorari denied *sub nom. Cotler Drugs, Inc.* v. *Chas. Pfizer & Co., Inc.*, 404 U.S. 871 (by implication; it rejects an argument by direct purchasers that indirect purchasers should be excluded from a settlement fund). District courts have entertained indirect purchaser claims in several post-*Hanover Shoe* cases. See, *e.g.*, *Boshes* v. *General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill.); *In re Master Key Antitrust Litigation*, 1973–2 CCH Trade Cases ¶ 74,680 (D. Conn.); *Carnivale Bag Co., Inc.* v. *Slide-Rite Mfg. Corp.*, 395 F. Supp. 287 (S.D. N.Y.). Other courts have concluded that some indirect purchaser claims are barred. See *City and County of Denver* v. *American Oil Co.*, 53 F.R.D. 620 (D. Colo.); *United Egg Producers* v. *Bauer International Corp.*, 312 F. Supp. 319 (S.D. N.Y.); *Travis* v. *Fairmount Foods Co.*, 346 F. Supp. 679 (E.D. Pa.).

decisions[15] and has been subjected to considerable scholarly criticism.[16]

We submit that the majority of the courts of appeals are correct; acceptance of petitioners' position would create a topsy-turvy rule under which only the persons least likely to have borne the injury could recover damages for violations of the antitrust laws. This Court has held that the deterrent purpose of the antitrust laws requires that some persons be allowed to recover even though they may be uninjured (as in *Hanover Shoe*) and even though they themselves took part in violations (as in *Perma Life Mufflers*). If these classes of persons may recover damages, does it not follow that indirect purchasers, when they are the victims of price fixing, should be allowed to recover? Allowing recovery by indirect purchasers not only provides deterrence but also serves the goal of compensating those who suffered loss. Cf. *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R. Co.*, 417 U.S. 703, 717.

2. Petitioners also draw from *Hanover Shoe* the proposition that indirect purchasers may not recover damages for antitrust violations because they are not in privity with the offender (see Pet. Br. 9–10, 22).

[15] See, *e.g.*, *Yoder Bros, Inc.* v. *California-Florida Plant Corp.*, *supra*; *In re Western Liquid Asphalt Cases, supra*. The status of *Mangano* in the Third Circuit itself is in doubt. In *Cromar Co.* v. *Nuclear Materials & Equipment Corp.*, *supra*, the Third Circuit adopted, without mentioning *Mangano*, an *ad hoc* balancing test for determining who may recover damages for antitrust violations. The test articulated in *Cromar* is inconsistent with *Mangano*, which held that no indirect purchaser may recover damages.

[16] See, *e.g.*, the articles collected in note 10, *supra*.

They observe that *Hanover Shoe* quoted a passage from *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (see 392 U.S. at 490–491 n. 8), and that this passage appears to say that only direct purchasers may recover.

Darnell-Taenzer was a case arising under the Interstate Commerce Act, and it did not discuss Section 4 of the Clayton Act. Taken in context, the Court's use of *Darnell-Taenzer* indicates only that a violation of the antitrust laws is complete when the overcharge is collected from the immediate purchaser. To the extent *Darnell-Taenzer* takes the position that a privity rule should be imposed in antitrust actions, which are a form of statutory tort,[17] time has passed it by.

Darnell-Taenzer was decided in 1918, when privity usually was required to recover damages for tortious conduct. But privity is not a precondition to recovery for the consequences of an intentional tort,[18] and even in the case of negligent torts privity is no longer a necessary ingredient.[19] Foreseeability and proximate cause, not privity, mark off the extent of the tortfeasor's liability.[20]

Any suggestion that the Court's quotation from

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[17] See *Simpson* v. *Union Oil Co.*, 311 F. 2d 764 (C.A. 9), reversed on other grounds, 377 U.S. 13; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967 (C.A. 7), certiorari denied, 321 U.S. 792.

[18] See A.L.I., *Restatement of Torts* §§ 279, 280 (1934); *id.* at § 870 (1939). See also A.L.I., *Restatement (Second) of Torts* § 774A (Tent. Draft No. 14, 1969).

[19] See A.L.I., *Restatement (Second) of Torts* § 402A(2)(b) (1965).

[20] See *id.* at §§ 430, 433, 435, 435A.

Darnell-Taenzer was intended to set aside a long line of cases holding that privity is unnecessary under Section 4 of the Clayton Act[21] is inconsistent with the Court's statement (392 U.S. at 494) that a defensive passing-on claim might be recognized in the case of a "cost-plus" contract. If, as petitioners imply, the Court meant to adopt a privity rule, then no one could recover whenever a cost-plus contract were involved. The direct purchaser could not recover because the defense of passing-on would be accepted; the indirect purchaser's claim would fail for lack of privity with the defendant. Nothing in *Hanover Shoe* supports such a result, and we submit that the Court did not adopt or endorse a rule requiring privity with the defendant as a condition to suit under Section 4.

C. THE POSSIBILITY OF DOUBLE RECOVERY AGAINST ANTITRUST DEFENDANTS DOES NOT JUSTIFY BARRING SUITS BY INDIRECT PURCHASERS

Petitioners raise the spectre of double recovery. The direct purchasers will recover the full amount of the overcharge without regard to any passing-on; therefore, they say, to allow any recovery by the indirect purchasers for overcharges that have been passed on would be to allow a second recovery, trebled, for the same overcharge. They conclude that this prospect can be avoided only by overruling *Hanover Shoe* or barring recovery by indirect purchasers.

This argument, although not without superficial appeal, is inadequate to support an absolute preclusion of recovery by indirect purchasers. Double recovery

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[21] See the cases cited in notes 3, 4, and 9, *supra*.

could occur only if many of the direct purchasers brought suit and recovered the full amount of the overcharges and if, thereafter, many of the indirect purchasers successfully proved that they had been damaged and also recovered. This will not often take place. Many potentially injured persons do not bring suit; *Hanover Shoe* is an example of this. Not all of the direct purchasers who sue recover the full amount of their claims; not all of the indirect purchasers who sue will be able to prove that overcharges were passed on to them. In fact, unless all of the direct purchasers sue and recover, damages actions by the indirect purchasers are the only way to ensure one full recovery by the victims of the unlawful conduct and the achievement of the deterrence Congress thought appropriate.

To put it another way, the possibility of double recovery in some cases does not justify a rule that in all cases indirect purchasers cannot recover. At best, it would provide support for a limitation on recovery by indirect purchasers if and only if, in a particular case, double recovery is threatened. That has not happened here. Petitioners do not contend that, if respondents prevail, the total recovery (including the amounts paid to the direct purchasers as part of a settlement) will exceed the total overcharges, trebled. This case is, therefore, not one in which double recovery is a problem.

The argument could conclude at this point. It is important, however, to point out that even if all of the direct and indirect purchasers bring suit, several procedural devices exist to avert multiple recovery.

If the direct and indirect purchasers bring suit in

the same court, it is a simple matter to consolidate the cases and to allocate damages in an appropriate manner. Fed. R. Civ. P. 42(a). The practicality of allocation among many purchasers has been demonstrated in the antibiotics cases. See *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 440 F. 2d 1079 (C.A. 2). See also Wolfram, *The Antibiotics Class Actions*, 1976 A.B.F. Res. J. 251.

There are only two situations in which multiple recovery could come about: (1) where suits by direct purchasers are pending in one court and suits by indirect purchasers are pending in another court; or (2) where additional suits are filed after a final decision, based on the same violation, has provided full recovery. Even in these situations, however, there are practical and procedural safeguards that make multiple recovery unlikely.

If suits by direct and indirect purchasers are pending in different courts, they may be handled in one or more of the ways suggested by the *Manual for Complex Litigation.*[22] The *Manual* suggests (§§ 5.20–5.40), among other devices, use of the inter-district transfer power created by 28 U.S.C. 1404(b), coordination of pretrial proceedings of cases pending in different districts, transfers to a single district pursuant to 28 U.S.C. 1404(a), and transfers by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. 1407. After pretrial transfers by the Panel, cases can be consoli-

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[22] 1 Pt. 2 Moore's *Federal Practice: Manual for Complex Litigation* (2d ed., 1976) ("*Manual*").

dated and transferred to the same district for trial under Section 1404(a).[23] See Rule 15 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. The courts also have considerable authority to adjust class definitions in pending class actions to prevent double recovery by claimants at different stages of the chain of distribution. See *Manual* §§ 1.41–1.43.

These procedures can be used whenever direct and indirect purchasers' suits are pending at the same time. One other possible procedure is the invocation of statutory interpleader under 28 U.S.C. 1335. This would bring all of the plaintiffs (actual and potential) into the same court and would require them to compete among themselves for appropriate shares of the total recovery.[24]

The possibility of double recovery is enhanced if some cases (say, the suits by direct purchasers) proceed to judgment before suits by other potentially injured persons are filed. Even then, however, the prospects of double recovery are remote. The protracted

[23] For discussions of this process, see Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv. L. Rev. 1001 (1974); Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. Chi. L. Rev. 588 (1972).

[24] Service of process for statutory interpleader runs nationwide (28 U.S.C. 2361), and only "minimal" diversity is required. *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 523, 530–531. Statutory interpleader may be used whenever there is a real risk of double liability, even though the extent of liability is not certain. *Allstate Insurance Co.* v. *McNeill*, 382 F. 2d 84 (C.A. 4), certiorari denied *sub nom. Murray* v. *McNeill*, 392 U.S. 931; *MFA Mutual Insurance Co.* v. *Lusby*, 295 F. Supp. 660 (W.D. Va.).

nature of antitrust litigation, combined with the short four-year statute of limitations (Section 4B, as added, 69 Stat. 283, 15 U.S.C. 15b), makes it unlikely that direct purchasers will recover before indirect purchasers bring suit. The possibility of subsequent suits may make defendants unwilling to settle with any plaintiffs until the statute of limitations has run on all claims; a defendant following such a course would not be exposed to unexpected liability. In many cases, the present one included, the potential private plaintiffs learn of the antitrust violation simultaneously when the federal government files suit, and the private suits are filed within a short time thereafter.

Moreover, when indirect purchasers file suit first, their offer to prove that the direct purchasers above them in the chain of distribution passed on the overcharge will require discovery, and the initiation of discovery will put the direct purchasers on notice of a suit relating to their interests. Once this notice has been given, the direct purchasers (or other indirect purchasers) can decide promptly whether to seek recovery; if additional cases are filed, they can be consolidated with those pending.[25]

If all else fails, and the indirect purchasers delay bringing suit until after the actions by direct purchasers have ended in judgment, thereby impairing the defendants' ability to seek consolidation and apportion-

[25] If indirect purchasers succeed in proving that overcharges have been passed on to them, the judgment might be used by the defendants to reduce the recovery in any future suit by direct purchasers. This would be a legitimate "defensive" use of passing on, in addition to the "cost-plus" contract example given in *Hanover Shoe, supra*, 392 U.S. at 494.

ment of damages, a district court might, under some conditions, properly invoke the doctrine of laches. In such cases, the indirect purchasers could eliminate the possibility of prejudice to the defendants, and thereby resuscitate their suit, by stipulating that their recovery, when added to the recovery by the direct purchasers, will not exceed the total of the overcharges, trebled. In appropriate cases courts might require indirect purchasers to do so.

There may well be other ways to avoid multiple recovery. Enough has been said, however, to show that multiple recovery is by no means an inevitable or even a likely result of allowing damages recoveries by indirect purchasers. There will be time enough to consider the problem of multiple recovery in any case in which it threatens to occur. This is not one of them. Petitioners never sought consolidation under Fed. R. Civ. P. 42(a), even though it appears that all suits against them were brought in a single district court. Although petitioners settled the suits by the direct purchasers, they stipulated that this settlement would not affect the suits by the indirect purchasers (A. 61–62); in light of this stipulation, petitioners do not contend that the settlement and payment to the direct purchasers is a reason why the indirect purchasers should not recover.[26]

[26] With or without this stipulation, the settlement with the direct purchasers could not affect the right of respondents to recover. Petitioners never sought the consolidation and apportionment of damages that would easily have averted multiple recoveries. The settlement conceivably may have exceeded the amounts that a court would have apportioned to the direct purchasers (although the record does not disclose the amount of the settlement), but parties that enter into a settlement assume that risk.

In sum, petitioners have not offered a persuasive reason for adding to the requirements of Section 4 of the Clayton Act the restriction that only direct purchasers may recover for their loss. Congress has made the judgment that "[a]ny person" injured "by reason of anything forbidden" in the antitrust laws shall recover treble damages. That legislative judgment cannot be carried out if, as petitioners argue, broad classes of injured parties are to be forbidden to attempt to prove their claims. Neither fear of multiple liability nor the application of labels such as "direct" or "indirect" justifies an inflexible rule precluding proof of actual injury.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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